"Brief in Support of Petition for Certiorari"

The opinion of the Circuit Court of Appeals for the Eighth Circuit, is found printed record Page 3 of the Proceedings of the Circuit Court of Appeals, and was decided October 25, 1943.

Jurisdiction.

The statutory provisions and rules of the court which is believed to sustain the jurisdiction of this court is Section 240, Judicial Code, Title 28, Sect. 347, U. S. C. A., and amendments thereof, and also Rule 38 S. Ct. Rules of the United States, Section 4, Subdivision (b), more fully set out in the Petition for the Writ of Certiorari.

Opinion Below.

This opinion in Circuit Court recites that this is an appeal from an order entered in a farmer debtor proceeding under Section 75s of the Bankruptcy Act. In re Rafert, 48 Fed. Sup. 459.

On a former appeal in the same proceeding an order of the District Court directed the appointment of a trustee to dispose of, or liquidate two mortgaged farms belonging to the debtor was reversed, and the court was instructed to restore the lands to the bankruptcy proceeding, and to proceed under Section 75, Subdivision s. Rafert v. Conway, et al., 8 Cir. 1, 119 Fed. (2d.) 102. One only of the two farms is involved in this appeal—the one subject to a mortgage owned by the respondent, the Equitable Life Assurance Society of the United States.

In compliance with the mandate of this court, in the above case, Judge Donohoe entered an order August 9, 1941, staying all judicial proceedings in any court against the debtor for a period of three years. The order provided that during the three-year period the debtor should pay share rent, and $10.00 cash per year for the use of the buildings and lots, and the well. The three-year period

would expire on August 9, 1944. The order provides, "if the debtor shall remain in possession for a portion of the 1944 crop year, considered as beginning on March 1, 1944, he shall pay rent proportionately for the time of such occupation."

The *amount* and *kind* of rentals provided for in this order conformed to the terms of a stipulation entered into between the debtor and the Equitable Life Assurance Company on July 25, 1941, and there is no complaint to this feature of the order. Thereafter the Equitable filed a petition April 6, 1942, asking an order of the court to fix the *time* for paying future rentals in accordance with the terms of the stipulation, and directing the debtor to pay all rentals promptly in accordance with the terms of the stipulation.

On April 22, 1942, it was stipulated that the debtor had on that day accounted for all 1941 rentals, except $10.00 which he did not collect, and would be paid in as soon as received from the tenant.

This petition came on for hearing before Judge Delehant on April 27, 1942, and an order was entered on that day approving and confirming the stipulation of April 22, 1942, which stipulation, however, *did not cover the time the rent should be paid.*

Then the court ordered that the "rent share of all crops raised during the pendency of bankrupt's moratorium be sold promptly after they are harvested, and proceeds *forthwith paid into court,*" and further provides "that the cash rental be paid on *December 1st.* of each year, and the rent share of the conservation money, if any, be paid into court *promptly upon receipt thereof.*"

These facts are all set out in the opinion above, and for the purpose of this application are conceded to be true. No appeal was taken from this order, referring to the order of Judge Delehant dated April 27, 1942.

However, on December 14, 1942, the Equitable filed a petition informing the court that the debtor had failed and refused to pay rentals into court in obedience to the order of April 27, 1942, and asking for an order enforcing pay-

ment in compliance therewith, and for the appointment of a trustee to liquidate the estate.

The debtor answered admitting his failure to turn over the rentals to the court under order of April 27, 1942, and asserted that the order was entered under a misapprehension of the provisions of Section 75, sub. s, and *without jurisdiction of the court.* After a hearing the conciliation commissioner reported, recommending that the debtor be given until February 1, 1942, to comply with the order, and pay the rentals, and that in the event he failed to make such payments before that date, a trustee be appointed to liquidate the estate. The debtor filed a petition to review the report of the commissioner and objections to his recommendations. He admitted he collected certain rentals, and the corn had been harvested, and was in his possession. He contended, however, that the order of April 27, 1942, was beyond the power of the court and was *void.* His contention was, that the act itself fixed the *time* for paying rentals, that the rent for the first year is not due and payable until the end of the year after entry of the stay order, and the rentals for the second and third years are payable in equal semi annual installments, that is, that the rentals for 1941, were not payable before August 9, 1942, and the rentals for the crop season of 1942 are payable in equal parts on February 9th. and August 9th, 1943.

In the hearing before the commissioner, debtor testified that he would pay $500.00 on February 9, 1943, that he intended to use the balance of $500.00 rental money to buy livestock to feed, and that he hoped he would not lose the last half of the rental money by speculations in hogs before the second rental payment was due according to his computation.

During oral argument to the court the debtor admitted he had in his possession $167.40 received from 372 bushels of barley and $850.00 received for about 1200 bushels of corn.

The court appointed a trustee for the sale or other disposition of the land in accordance with the provisions of Section 75, sub. s3 of the Bankruptcy Act, reserving to the debtor his redemption rights. The order provided that

the appointment of a trustee should have no force and effect in the event the debtor should, on or before February 15, 1943, pay into the registry of the court *all* rentals received by him on or before that date for 1942, and lodge with the clerk a statement in writing giving detailed information as to the crops accounted for.

A certificate of the clerk dated March 1, 1943, states that the debtor had paid no rentals for 1942 into the Registry of the court at that time.

To justify his persistent refusal debtor relies upon the construction of that part of the provision of Section 75, sub. s2 reading, "during such three years the debtor shall be permitted to retain possession of all, or any of his property in the custody and under the supervision and control of the court, provided he pays a reasonable rental *semi-annually* for that part of the property of which he retains possession. The first payment of such rental shall be made within one year of the date of the order staying proceedings, the *amount* and *kind* of such rental to be the usual customary rental in the community where the property is located, based upon the rental value, net income, and earning capacity of the property."

The debtor contends that the words "first payment of such rental shall be made within one year of the date of the order staying proceedings" giving the debtor his right to pay on the last day of that year, and the words "pay a reasonable rental semi annually" means that rentals accruing after the end of the first year are payable in equal semi annual installments at the end of each half year, not before, and that the court has no power to fix any other date for payment.

All these facts are set out in the opinion sought to be reviewed, and are conceded by the petitioner. However, with reference to the recitation in the opinion "that none of this rent was paid for the year 1942" we call the court's attention to the abstract of the record which was used below, which is submitted herewith, wherein on page 10 of said abstract the conciliation commissioner admitted that the bankrupt testified that he received $167.40 for the barley above referred to, but the corn had been picked, and his

share amounting to 1200 bushels had been separated, but that he had not sold it, and at that time he had not received $120.00 or $130.00 of landlord's share of the money. On the top of page 11 of the Abstract of Record the commissioner admits the bankrupt stated that he would pay half of the 1942 rentals on February 9, 1943, and the other half on August 9, 1943, contending that he could only be required to pay the rent *semi-annually.*

Again on page 12 of the commissioner's report he admits that the bankrupt said that when he sold the corn he would have approximately $1000.00 in cash on hand, and that he would pay $500.00 on February 9, 1943. In the debtor's objections page 14 of the Abstract of Record he admits the same as the referee found. He offered to pay half of the 1942 rent on February 9, 1943, which was the day fixed by the act itself for the semi annual rent, and the other half August 9, 1943, as provided by the act. His contention being the act itself fixes the time when the rent is due and payable, and the court, therefore, is without jurisdiction to fix a different time.

On page 15 of said Abstract of Record submitted herewith, the debtor offered to pay into the Registry of the Court on February 9, 1943, half of all rentals he has received, and collected up to that time, and that he will pay the other half on August 9, 1943. He asked in his objection that the time set out in the order of April 27, 1942, be *set aside* and decreed to be *beyond the jurisdiction of the court,* and the debtor be ordered to pay half of all rent collected on February 9, 1943, and the other half on August 9, 1943. Page 15 Abstract of the Record.

Opinion of District Court

Judge Delehant in his opinion found at the bottom of page 17 of the Abstract of Record, and also in the 48 Fed. Sup. 459 (462), stated, "that the debtor offered to pay in half of what he had on February 9, 1943, and the other half on August 9, 1943."

The court in its opinion page 20 of the Abstract of Record admits that at the time the order was made the money

had not even been collected for the corn, nor the government crop benefit.

In fairness to the debtor in addition to the record, which only certifies that he had not paid the money in, it should have found and shown, that he offered to pay it into court and neither the clerk would take it, nor would the attorney for the Equitable. However, that proposition is not involved in this case.

With this record this Circuit Court of Appeals held that the debtor's claim that the court was without power and jurisdiction to enter the order of April 27, 1942, fixing the time for payment and the order of February 3, 1943, enforcing it, is not sound. The court giving as their reason for so holding "the subject matter of the proceeding, and the debtor were both within the jurisdiction of the court, and although the first order may be erroneous, a point which *we do not decide,* it was not void and since the debtor did *not appeal* from the order of April 27, 1942, it is *final* and binding upon him, unless the court in the exercise of sound discretion subsequently reopens it, sets it aside, or modifies it." Following Wayne United Gas Co. v. Owens Illinois Glass Co., 300 U. S. 131. The Circuit Court went on to say, "that the debtor made no complaint at the time the order was entered into, and it was in accordance with a previous stipulation (which by the way was entered into prior to the filing of his petition under Section 75, sub. s)" and was not followed in Judge Donohoe's order entered after the Circuit Court of Appeals had reversed his former ruling, and ordered him to restore the bankrupt and his property to the bankruptcy court.

The Circuit Court affirmed the lower court's decision on the ground that the debtor had not appealed from the order of April 27, 1942, and refused to pass on the question as to what was meant by the expression in the Frazier-Lemke Act "that the rent should be payable semi annually."

In this the debtor alleges, and claims the court erred, and a petition to review the matter should be granted, for the reason that this case as far as we have been able to ascertain will be the first case to pass upon the question by this court or any other court as to whether or not an order of the district court can in *plain violation of the express*

terms of the Frazier-Lemke Act fix the *time* that the rent shall be paid, other than as therein fixed, and whether or not an order of that kind must be appealed from or otherwise it is binding on the debtor, being only erroneous at the best and not absolutely void.

It is our contention, therefore, that this is a matter of great public importance, involves the construction by this court for the first time of a federal question, and that in principal this opinion is in direct violation of the former opinion in this case, and in direct violation of the other cases that we have cited in our petition, in holding that this order is not void, but even if erroneous is binding unless an appeal is taken direct from the order fixing the time, and an appeal is not sufficient when the debtor appeals in due time from the order made pursuant to his alleged failure to comply with the order fixing the *time.* The debtor's claim being that he is in time if he appeals from an order directing the liquidation of his property for a violation of that order, as that is the first time that he is deprived of his property by any order of the court. Therefore, the debtor has appealed in time.

Judge Delehant in his opinion referred to the fact that the other debtor, Rosella Conway was compelled to bring a proceeding with reference to the Seward County farm belonging to this debtor which is not involved in this proceeding, and it is our contention that that proceeding has nothing to do with the controversy here. The facts in that case, however, were that the creditor there as here commenced her proceeding to force the debtor to liquidate *before* the first year *was up* for the payment of rent, but as soon as that proceeding was commenced the debtor claimed there as he claimed here, that he was required to pay the rent only as the Frazier-Lemke Act specifically provides for the first year's rent, and by agreement of the parties he is paying his rent *semi annually* in that case and every one is satisfied. Therefore, that should not have been referred to in this opinion at all.

It is therefore, our contention that this not only involves for the first time a controversy which calls for the construction of the meaning of the Frazier-Lemke Act with reference to the use of the word "semi annually," as to the

payment of the rent, but it is also in direct violation of the principle involved in several previous cases of the Supreme Court of the United States and the Circuit Court of Appeals.

(Rafert v. Conway Discussed.)

This decision is in direct violation of the principles involved in the previous appeal in this case, that of, Rafert v. Conway, 119 (2d.) Fed. 102, 8th Circuit.

In that case, as in this, we did not appeal from the order of Judge Donohoe which was entered into prior to the filing of Section 75, sub. s, where it *attempted to fix the time* for the payment of the rent. We did appeal in that case as in this case from the order made pursuant to the debtor's failure to comply with that order, wherein the court sought *to order a liquidation of the debtor's estate.* With reference to failure to appeal from the first order the Circuit Court of Appeals in the prior opinion stated, "that an unappealed order which directed that all necessary steps should be taken by the conciliation commissioner and referee to preserve the right of the farmer debtor judicially establishes the farmer debtor's rights to benefits of the bankruptcy act provisions authorizing him to seek bankruptcy adjudication, and that an order made by the district court for the appointment of a trustee for an abandonment of land, and for permission to complete mortgage foreclosures, for debtor's failure to make the payment as required by *previous order,* constituted error, since there is *no discretion* in a bankruptcy court to *deprive debtor of fundamental rights under the act.*"

The Circuit Court in the same opinion also held, "that there was no power to deprive the farmer of them except in strict compliance with the provisions of Section 75 (s), liberally construed to effectuate the legislative intent." And holding in that case, *that it was not necessary to appeal from the order fixing the time of the rent said,* "that the order of April 19, 1939, would not dismiss the debtor's land, nor order their abandonment nor permit foreclosure of the mortgages. It went no further than to direct *that the debtor should make certain payments.*

Now, that is what we are contending in that case, that the order of April 27, 1942, went no further than the order of Judge Donohoe did in the former opinion, yet the former opinion held that we did not have to appeal from that order.

Now the Circuit Court holds in this case, we should have appealed from that order and having failed to appeal we cannot raise the question as to what is meant by the Frazier-Lemke Act "*semi annually.*" The principle, therefore, involved in this case is exactly the principle that was involved in the prior Rafert case above referred to, and the conclusion reached by the Circuit Court in this case is *directly opposite* to what the court reached in the former opinion. The former opinion in our case becomes the *law of the case right* or *wrong* as it was not reviewed in any manner.

(Wright v. Union Central Life Ins. Discussed.)

The rule announced in this opinion is contrary to the principle involved in Wright v. Union Central Life Ins. Co., 311 U. S. 273, 61 Sup. Ct. Rep. 196, your honors held in that case, which ordered the land of the farmer debtor sold to the highest bidder for cash, without any relief from valuation and appraisement law, was in violation of the provisions of Section 75 s, and you also said in that case as the Circuit Court held in the Rafert case above, "that there is *no discretion* in the court to *deprive* the debtor of the *express* and fundamental *statutory rights* under Section 75 (s) *dependent upon general equitable considerations.*"

(Wright v. Vinton Discussed.)

And referring to the former Wright v. Vinton case, 300 U. S. 444, 57 S. C. R. 556, you held, "there is nothing in that opinion, or in the act which states that that power may be utilized so as to wipe out the clear and express right of the debtor under Section 75 (s), nor can the existence of that power be *fairly implied,* and that the power of the court to order the property sold, or otherwise disposed of as provided in the act cannot be taken to mean a *discretionary power* to *terminate* the proceedings through the exclusive device of a public sale."

This Circuit Court of Appeals stated that in effect the Wright v. Vinton case just referred to held, "that with reference to the first year, that the *court could fix the time at least for the payment of the first year's rent.*"

It is our contention that the court did not decide any such a thing. The court was not called upon to decide that question, but was only passing upon the constitutionality of the act, and in discussing the constitutionality of the act as to whether or not it was an unreasonable restraint upon the rights of the creditor stated not that the court could fix the first year but quoting said, "the clause providing that the first payment of such rental shall be within one year is obviously capable of two constructions, (1) that the mortgagor may not be required by the court to pay before the close of the year, (2), that the court may not postpone the payment beyond one year, and the court said in view of the requirement of *semi annual rental* the latter seems to us more reasonable, but you went on to say, "we intimate *no opinion* as to the *validity* of this provision under the *first construction.*" As here construed the clause cannot be deemed arbitrary or unreasonable.

The doubt in the mind of the writer was only as to the payment as to the construction put upon the first year rent which is not in controversy in this case, because the record shows the first year's rent was paid to the satisfaction of all concerned.

Your Honors did not hold as this Circuit Court of Appeals decided, that you adopted the construction that the court could *fix* the time of payment for the first year's rent. That was merely dictum in that case as was the further statement "that the farmer debtor's property could be liquidated if he was hopelessly insolvent before the three years were up, but this dictum was clearly overruled in the *Bartels* case by Chief Justice Hughes.

(Bartels Case Discussed.)

In John Hancock Mutual Life Ins. Co. v. Bartels, 308 U. S. 180, 60 Sup. Ct. Rep. 221, it said "that that dictum, see note 6 in the opinion, was not essential to the opinion, and is *not supported by the terms of the statute.*"

Now, that is exactly what we contend here, that the power of the district court to fix the time for the payment of rent is not supported by the terms of the statute. In discussing the power of the court under the Frazier-Lemke Act in the Bartels case, your honors said, "to hold that the court has the *discretion* to *deny* or to *grant* debtor rights to redeem at the reappraised value, or at the value fixed by the court, would be to *rewrite the act* so as to vest in the court a power which Congress did *not plainly delegate.*"

Now, that same expression was used and followed in the former Rafert case.

(Borchard Case Discussed.)

Your honors in Borchard v. California Bank & Trust Co., 310 U. S. 311, 60 Sup. Ct. Rep. 97 states, "that the precise matter in controversy was whether the bankruptcy court may permit foreclosure of mortgage liens when the procedure prescribed by Sec. 75 (s) has not been followed." In that case the record showed that for several years after the bankrupt had filed his petition under Section 75 (s), and a stay made, and the debtor requested an appraisement, and his exempt property be set aside to him, and that he be allowed to retain possession under the supervision and control of the court of all the remainder of his property. Nothing was done pursuant to appraisal and award of possession, but a stipulation was entered into by the parties by the terms of which certain moneys, proceeds of crops were to be paid into the bank, and by it expended for the cultivation and improvement of the land. These stipulations were approved by orders of the court. No appeal was taken from *any of the orders.* Then an application was made that no further delay be allowed the debtor, and the creditor be allowed leave to sell under certain trustees that were appointed. This petition was granted. The Circuit Court of Appeals affirmed this decree citing Wright v. Vinton Branch and Trust Bank, 300 U. S. 440 cited above, but your Honors in reviewing this Borchard case held, "we are of the opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its lien at this stage of the proceeding, was *contrary to the provisions of Section 75*

(s)." You approved the Bartels case holding, that there should be a stay entered which would assure the debtor possession for three years *from the date of the order, upon the conditions mentioned in the act.*

Your Honors stated instead of complying with the law the bank resorted to a procedure *not contemplated by statute.* Your Honors held, that although stipulations had been entered for 31 months, the court still held, that the petitioners were entitled to compel creditor to comply with the procedure *required by statute.* Saying it cannot now maintain that the *disorderly* and *unauthorized procedure* followed by the parties is the *equivalent* of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens.

Now, in that case none of the orders of the court were appealed from, and in fact they were consented to by the parties.

(Peterson Case Discussed.)

In Peterson v. John Hancock Mut. Life Ins. Co., 116 Fed. (2d) 148, decided by the 8th Circuit, it was contended, that the court had certain *discretion* to dismiss the proceedings, but that court held, "that legal *discretion does not extend to a* refusal to apply well settled principles of law to a conceded or indisputable state of facts, and that the provisions of the farmer debtor act are *explicit* and *mandatory* as construed by the United States Supreme Court, and the District Court has no *discretion* to act *contrary to their terms,* and held that the order of the commissioner denying a stay and decreeing that the land was burdensome, and that to allow the state court to proceed as if no proceedings had been had was *absolutely void,* and the Conciliation Commissioner's orders were contrary to the *terms of the statute.*

It was there contended as this Circuit Court now seems to hold that this order was a *discretionary order,* but the Circuit Court at that time held, that in this view counsel are *mistaken,* and the motion for rehearing called for a judicial *decision,* not for judicial *discretion.*

(Kalb v. Fuerstein Case Discussed.)

In Kalb v. Fuerstein, 308 U. S. 433, 60 S. C. R. 343, your Honors held, "that in discussing the power of a Wisconsin court, although the Wisconsin court has *general jurisdiction* over mortgage foreclosures, the peremptory *prohibition of the* Frazier-Lemke Act renders any act in violation thereof, *absolutely void,* and *want of jurisdiction* need not be contested or *even raised by the farmer debtor.* Congress power is plenary. And that the Conciliation Commissioner should assist farmers in obtaining their rights under the act, and they should *not be* required to *hire attorneys* in any proceeding under this section.

Now, we contend that the same rule should be applied here, that the United States District Court has no more general jurisdiction in face of the peremptory prohibition of the Frazier-Lemke Act any more than the state court could have. And as the Frazier-Lemke Act has not given the District Court the right to fix the *time* for payment of rent, the attempted order of the District Court is not merely erroneous and should be appealed from, but is *absolutely void and* of *no effect.* As your Honors held in the Kalb case with reference to the state's power.

(Federal Land Bank v. Morrison Discussed.)

In Federal Land Bank of Louisville v. Morrison, 133 Fed. (2d.) 613, 6th. Circuit, that court held, "that the filing of a petition in bankruptcy under Section 75 subjects the farmer debtor and his property to the exclusive jurisdiction of the bankruptcy court, and the debtor and creditors *cannot by agreement waive* or *modify* the provisions of the bankruptcy act relative to agricultural composition, even though agreement was entered into *before petition in bankruptcy was filed.* It was there contended as this court now apparently holds, that the court under its *general discretionary powers* has the authority during the bankruptcy proceeding to *appoint a receiver.*

The evidence in that case shows that the debtor and creditor had entered into an agreement allowing the receivers already appointed to *continue* and *collect* the rents and further provided that the rents should be applied on

the *mortgage* indebtedness. The lower court held this agreement *void*, and ordered the rents and profits returned to the *mortgagor*, and the Circuit Court of Appeals affirmed that decision, holding "that all acts of the receiver after March, 1935, when the debtor was entitled to possession under Section 75 (s), was *absolutely void* and *without authority of law.*" The court saying, that the debtor and creditor *cannot waive* or *modify* the *provisions of Section 75.*

Judge Delehant on page 24 of the printed record in discussing this question with reference to the *time* that the rent is payable under the Frazier-Lemke act states, "that the citation by the debtor in support of his petition of the Bartels case, the Borchard case, the Peterson case, and the Wright v. Union Central Life Ins. Co. case, and the Kalb v. Fuerstein, are not persuasive, and he will not, except in pursuance of a reversing mandate, allow to the adverb "*semi-annually*" in this context a significance that would do violence to the manifest and declared purpose of the legislation." In what way it does violence he does not point out.

We claim that it clearly demonstrates that this case involves a new proposition never having been definitely passed on by any court, but we claim that this last decision, from which we request a petition for review by writ of certiorari is directly in violation of the rules laid down in the former *Rafert* cases, and *all these other cases cited.* All these cases treating any order made by a court in direct violation of the mandate, and specific provisions of the Frazier-Lemke Act not merely erroneous, but *absolutely void*, and *beyond the jurisdiction of the court*, and that under the rule laid down in the former Rafert case, and also in the Kalb case, we need not appeal from a *void* order, because that order does not deprive us of our property, but that it is the order made pursuant to that *void* order, which attempts to deprive us of our rights under the Frazier-Lemke Act, and from that order we have appealed in time.

We also desire this court to consider our former brief filed in the Circuit Court of Appeals which accompanies

this petition, as it is short and not only involves the same questions that are involved here but goes more in detail in discussing the various cases herein relied upon to obtain the petition.

We, therefore, respectfully ask that said petition be granted, and a Writ of Certiorari issue to review the rulings of the lower court in this proceeding.

Respectfully submitted,

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